creditor, it is not entitled to present a petition or apply for a winding-up order. It has no locus standi and the petition must fail (see *Mann & Another* v *Goldstein & Another*[2] at p 771).

From the evidence adduced before this court, it is clear that the respondent company disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claims that the petitioner is in a debit balance to the extent of $1,039,744. In the circumstances, the petitioner is not a creditor as envisaged in s 217 of the Companies Act. Therefore, the petitioner is not entitled to issue the statutory notice or file the petition, as it has no locus standi. The action of the petitioner in issuing the notice and filing the petition is an abuse of the process of the court.

Mr Ong Ban Chai, counsel for the petitioner, submitted that the court should only consider the words of the petition and not rely on affidavit evidence. In support of his submission, he cited the case of *New Straits Times (Malaysia) Bhd* v *Kumpulan Kertas Niaga Sdn Bhd & Anor.*[3] But in the present case, the respondent company is relying on O 18 r 19(1)(d) and not r 19(1)(a). Therefore, affidavit evidence is admissible.

On final question to be considered is whether it is too late for the respondent company to make the present application. The petition was filed on 12 October 1987. The application was filed on 8 March 1988, a delay of about five months. In fact in the present case, a hearing date for the petition has already been given. In my opinion, it is not too late for the respondent company to file the present application (see *Re St Piran Ltd*[4] at p 273).

For the reasons stated above, the petition is struck out under O 18 r 19(1)(d) of the Rules of the High Court and under the inherent jurisdiction of the court. The petitioner will pay the costs of this application to the respondent company.

Order accordingly.

Solicitors: *Ong Ban Chai & Co.*; *SP Lim & Co.*

Reported by *Ng Sheau Jiuan*

Pasaraya Seri Sayang Sdn Bhd v Majlis Perbandaran Pulau Pinang

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO 31-818-87
MOHAMED DZAIDDIN J
13 NOVEMBER 1987

Landlord and Tenant – Repossession of leased premises due to rental arrears – Whether repossession was done without tenant's consent – Whether there was waiver on landlord's part as to his right of re-entry – Whether seven days' notice is unreasonable – National Land Code 1965, s 234 – Specific Relief Act 1950, s 8(1)

By a tenancy agreement, the defendants let to the plaintiffs the demised premises for a period of two years. Clause 2 of the agreement stated that if the rent shall at anytime be in arrears and not paid for 14 days after it becomes due, then the defendants may re-enter upon the premises. As the plaintiffs had been in arrears of rental and the notice of demand of rental had not been complied with, the defendants repossessed the premises. The plaintiffs applied for a declaration that the forfeiture of the demised premises by the defendants is illegal and void or, alternatively, that they had been dispossessed of the demised premises otherwise than in due course of law.

The defendants submitted that they repossessed the demised premises legally and had exercised their rights under the tenancy agreement and in compliance with ss 234 and 235 of the National Land Code. The plaintiffs, on the other hand, argued that as the forfeiture was enforced by re-entry into the demised premises and not by any order of court, it must therefore be subject to the provisions of 'any other written law for the time being in force' (in the words of s 234 of the National Land Code) and that this law is found in ss 7 and 8 of the Specific Relief Act 1950.

Held, dismissing the application: (1) Under s 8(1) of the Specific Relief Act 1950, the plaintiffs must satisfy this court that they have been dispossessed of the demised premises without their consent and that such dispossession was otherwise than in due course of law.

(2) Whether consent was given or not is a question of fact. Weighing the affidavits of both sides, on the balance of probabilities, the plaintiffs have failed to prove that the dispossession was without their consent.

(3) There was no waiver on the part of the defendants. Giving a further time before the re-entry and not enforcing it strictly to comply with the term of the notice to deliver up vacant possession cannot in the circumstances of this case constitute a waiver. There must be some positive acts of waiver.

(4) The question of whether a notice of seven days to deliver up vacant possession was unreasonable depends on the circumstances of each case. In this instance, the period of seven days is reasonable.

Legislation referred to
National Land Code 1965 ss 213, 234, 235
Rules of the High Court 1980 O 18 r 19
Specific Relief Act 1950 ss 7, 8(1)

K Balasundaram for the plaintiffs.
Lourdunathan Andrew for the defendants.

Cur Adv Vult

Mohamed Dzaiddin J: The plaintiffs' application in enclosure 2 is for a declaration that the forfeiture of the premises known as 1st and 2nd Floors, Pasar Chowrasta, standing on lot no 113, (1) TS 18, NED Penang ('the demised premises') on or about 10 June 1987 is illegal and void. Alternatively, the plaintiffs pray for a declaration that they had been dispossessed of the demised premises by the defendants otherwise than in due course of law. If they succeed in their application, the plaintiffs pray that the defendants deliver up possession of the demised premises and pay damages as a result of wrongful dispossession and costs.

In enclosure 9, the defendants are asking for an order to strike out the plaintiffs' originating summons under O 18 r 19 of the Rules of the High Court on the ground that the originating summons does not disclose any reasonable cause of action, that it is frivolous, vexatious and an abuse of the process of the court.

The plaintiffs' application is supported by the affidavits of Mr Lai Giap Hwa, a director of the plaintiff company, affirmed on 9 and 17 September 1987 (enclosures 1 and 6). Both Mr Ong Chin Seng, the assistant director (general administration and development) and Mr Ram Belani, the director of legal affairs of the defendants, affirmed their affidavits in reply on 14 September and 6 October 1987 (enclosures 10 and 12). From these affidavits, the following facts are not disputed. By a tenancy agreement dated 16 June 1986 ('the said agreement'), the defendants let to the plaintiffs the demised premises for a period of two years commencing from 1 September 1985 at a monthly rental of $28,500 and upon the terms and conditions therein contained. However, the rental was subsequently reduced to $22,800 per month with effect from 1 June 1986 vide a supplemental deed dated 29 September 1986. Under the said agreement, the plaintiffs are required to pay the rental in advance on the first day of each month. Deposit of $85,500, being an equivalent of three months' rental, was also paid together with the first month rental. It is further provided that "if the rent or any part thereof shall at any time be in arrears and not paid for 14 days after the same shall have become due, whether formally demanded or not, the landlord may at anytime thereafter re-enter upon the demised premises and hold and enjoy the same without prejudice to the landlord to any right of action or remedy against the tenant." For the purpose of this application, it is worth mentioning that either party may terminate the tenancy by giving one month's written notice to the other and any notice under the said agreement must be in writing.

Let me first deal with the defendants' application (enclosure 9) asking this court to strike out the plaintiffs' originating summons made under O 18 r 19 of the Rules of the High Court. Upon considering the affidavits of the parties, I find that there are issues to be tried. It is trite that only in plain and obvious cases that recourse should be had to summary procedure under O 18 r 19 and the power conferred by this rule will only be exercised by the court where the case is clear beyond doubt. Although there is no substantial dispute on the facts, I find that the issues of law as raised by the plaintiffs in their application merit consideration. As such, it cannot be said the points of law involved are frivolous, vexatious or the plaintiffs' application discloses no reasonable cause of action and an abuse of the process of the court. Hence, I dismiss the defendants' application (enclosure 9) with costs.

Reverting back to the plaintiffs' application (enclosure 2), it is not disputed that the plaintiffs had been in arrears of the May rental. Provision (i) of cl 2 of the tenancy agreement clearly states that if the rent thereof reserved or any part thereof shall at anytime be in arrears and not paid for fourteen days after the same shall become due (whether formally demanded or not) then the landlord may at any time thereafter re-enter upon the demised premises and hold and enjoy the same as if the tenancy had not been granted. So, as rents are payable in advance, by a letter dated 9 May 1987 the defendants demanded payment for the May rental for $22,800 and requested the plaintiffs to remedy the breach within two weeks from the date of the notice, failing which they are entitled to re-enter and repossess the demised premises. As this notice was not complied with by the plaintiffs, the defendants wrote to the plaintiffs on 25 May 1987 giving them notice that they were required to deliver up vacant possession within one week from the date thereof, failing which the defendants would re-enter and repossess the said premises. On 10 June 1987, Mr Ong Ching Seng and his enforcement officers repossessed the demised premises.

Mr Andrew, counsel for the defendants, submitted that his clients repossessed the demised premises legally and had exercised their rights under the said agreement and in compliance with ss 234 and 235 of the National Land Code. Section 235 provides that the notice in writing must specify the particular breach complained of, requiring the plaintiffs to remedy the said breach, ie paying the arrears of rent. I have no doubt that the plaintiffs have complied with these requirements.

Section 234(1)(a) of the National Land Code says that every lease, sub-lease or tenancy exempt from registration shall, subject to any express provision therein to the contrary, be liable to forfeiture if the lessee, sub-lessee or tenant for the time being breaches any of the provisions thereof, express or implied. As this is a tenancy for a period of two years, by virtue of s 213(1)(a) it is a tenancy exempt from registration. Sub-s (2) of s 234 further provides as follows:

> The forfeiture of any lease, sub-lease or tenancy may be enforced by the person or body for the time being entitled to the reversion thereon *either by re-entry onto the land* or by action in the court, *but subject in the former case to the provisions of any other written law for the time being in force.*
>
> (Emphasis is mine)

Mr Balasundram, counsel for the plaintiffs, argued that as the forfeiture was enforced by re-entry into the demised premises and not by any order of court, it must therefore be subject to the provisions of any other written law for the time being in force, which is the Specific Relief Act 1950, ss 7 and 8.

Section 7 of the Specific Relief Act provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure. I do not think there is any quarrel on this as our Rules of the High Court prescribes that the application may be brought by originating summons.

Next, Mr Balasundram submitted that s 8 of the Act applied to the plaintiffs. Counsel maintained that the defendants had acted illegally in having taken over possession of the demised premises without the plaintiffs' consent and otherwise in due course of law. Section 8(1) states as follows:

> If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.

Pollock and Mulla on Indian Contracts and Specific Relief Acts, 9th Ed at p 814 says that the section gives a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law for recovery of possession. Therefore, under s 8(1) above, the plaintiffs must satisfy this court that they have been dispossessed of the demised premises without their consent and that such dispossession was otherwise than in due course of law. First, the plaintiffs said that the dispossession and re-entry by the defendants was not consented to by them. In his affidavit, Mr Lai Gaik Hua alleged that on 10 June 1987 the defendants with the assistance of their enforcement squad entered the demised premises, ordered the staff to leave and forcibly and without the consent of the plaintiffs took possession of the demised premises, locked up the doors, posted their enforcement squad as guards and refused entry to the plaintiffs' agents or servants. The defendants denied these allegations. Mr Ong Chin Seng, in his affidavit (enclosure 10), deposed that on the material day at about 10.30 am he went to the demised premises with his enforcement officers. On arrival, they were met by the plaintiffs' two directors and an accountant. As the supermarket was not yet opened for business, they were in the general office. His officers did not meet any opposition or resistance from the plaintiffs' servants or agents. According to Mr Ong, the directors with the help of the workers appeared ready to vacate the demised premises. He also noticed that some of the goods in the supermarket had already been removed. He further deposed that when being informed that he and the officers had come to repossess the demised premises the directors voluntarily and peaceably surrendered possession, except one of the directors who had asked for permission to remove their office records and account books from the demised premises. According to Mr Ong, the workers had also assisted his officers to lock up all the doors of the demised premises using the defendants' padlocks. Mr Ram Belani, in his affidavit (enclosure 12), also affirmed that he entered the demised premises after his officers had gone inside and they were already in the process of locking up. He was met by an accountant, who enquired whether he had any court order for repossession of the demised premises. On being told that an order was not necessary, the accountant asked if it was possible for the defendants to allow him and his accounts clerk to enter the demised premises from time to time to do the accounts. Mr Belani told him they could not do so, but stated that if they wish they could remove all the accounts books from the demised premises.

In response to the defendants' affidavit, Mr Lai affirmed a further affidavit rebutting the allegations of Mr Ong and Mr Ram Belani as contained in their affidavits. According to him, he was the director present at the material time together with one Mr Soo Joo Heng. It was Mr Soo who demanded Mr Ram Belani to produce a court order. On being informed that there was no need to obtain a court order, Mr Lai alleged that Mr Belani peremptorily ordered them to leave the demised premises. Further, Mr Lai stated that while the argument was going on, the defendants' enforcement squad was fitting the padlocks to the doors of the supermarket. He admitted that because of the presence of the enforcement squad and with a view to avoiding any breach of the peace, the plaintiffs, their servants or agents did not offer any resistance. However, he maintained that the plaintiffs' directors and staff were intimidated, coerced and ordered out of the demised premises by members of the enforcement squad.

It now falls on me to consider the conflicting affidavit evidence of the deponents in order to discover whether the repossession of the demised premises was without the consent of the plaintiffs. I think whether consent was given or not is a question of fact. Weighing the affidavits of both sides, on the balance of probabilities, I accept the deposition of Mr Ong and Mr Ram Belani that the re-entry and the repossession were done with the consent of the plaintiffs through their director, Mr Ong and his staff. In his affidavit (enclosure 6), Mr Ong stated that he and the staff did not offer any resist-

ance to the re-entry and repossession because of the presence of the defendants' enforcement squad and with a view to avoid the breach of the peace. The question asked here is: did he expect any trouble where a breach of the peace may occur, and if so what did he do other than offering no resistance? Did he lodge any police report regarding the illegal re-entry or for that matter was there any subsequent report lodged in connection with his allegation in the affidavit that he and the staff were coerced, intimidated and forcibly ordered out of the premises. Failure on this part in not producing or exhibiting any police report to this effect or in not mentioning of the same in the said affidavit influences me to favour and accept the defendants' version that the re-entry and repossession was done with the plaintiffs' consent. In addition, in the absence of any evidence regarding these allegations, I consider them to be just a bare allegation. For these reasons, I hold on the balance of probabilities that the plaintiffs have failed to prove that the dispossession was without their consent. Therefore s 8(1) of the Specific Relief Act 1950 cannot be invoked by the plaintiffs.

Assuming that I am wrong on my finding that the dispossession was with the consent of the plaintiffs I shall proceed to consider whether under s 8(1) of the Act the dispossession was otherwise in due course of law. What this expression 'in due course of law' means is explained in *Pollock and Mulla* (supra) at p 816:

> The words 'due course of law' are not merely equivalent to the word 'legally', for a thing which is prefectly legal may still be by no means a thing done 'in due course of law'. The expression 'due course of law' means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus though a landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over, he may not dispossess him of his own authority. If he does so, it is competent to the tenant to sue the landlord for possession under this section.

Mr Balasundram submitted that the dispossession was otherwise than in due course of law because there was waiver on the part of the defendants and the time of one week given in the notice dated 25 May 1987 and in compliance with s 235 of the National Land Code was unreasonable. First, counsel submitted that failure on the part of the defendants to re-enter and repossess the demised premises immediately after the expiry of seven days from the date of the notice, 25 May 1987, amounted to a waiver under s 234(3) of the National Land Code. It is a fact that the defendants repossessed the demised premises on 10 June 1987, a period of two weeks from the date of the notice. The question here is whether the extra seven days amount to an act on the part of the plaintiffs showing the intention to treat the tenancy as still subsisting and therefore constitute a waiver? In my my opinion, by merely giving a further time before the re-entry and not enforcing it strictly to comply with the term of the notice cannot in the circumstances of this case constitute a waiver. There must be some positive action of waiver (*Halsbury's Laws of England*, 4th Ed, Vol 27 para 429). What acts amount to a waiver – see, ibid, para 430.

Secondly, counsel argued that a period of seven days in the notice dated 25 May 1987 for the plaintiffs to deliver up vacant possession was unreasonable. He argued that the plaintiffs should have been given more time. Again, in my opinion, the question whether seven days is reasonable depends on the circumstances of each case and in this instance I find the period of seven days is reasonable. For the above reasons, in my judgment the plaintiffs have failed to invoke s 8(1) of the Specific Relief Act 1950 in their application.

Therefore, having considered the entire arguments and the affidavits in support of the application, I am satisfied that the defendants had exercised their right of forfeiture legally and in compliance with the provisions of s 234 of the National Land Code. The plaintiffs' application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Balasundaram & Co.*; *Andrew & Co.*

Reported by *Ng Sheau Jiuan*

Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION NO F32-49-86
CHAN J
18 MAY 1987

Land Law – Land charged to defendant bank – Charge registered under National Land Code – Purchaser of apartment assigned all rights in apartment to plaintiff bank – Land Administrator ordered sale of land by public auction – Appeal by plaintiff bank against order – Whether actual or constructive fraud must be established to defeat title of first bank – National Land Code 1965, s 340(2)

The registered owner of a piece of land on which an apartment block stood had charged the land to the defendant bank in September 1983. This charge was duly registered under the National Land Code. However, in June 1983, a purchaser of one of the apartment units had obtained a housing loan from the plaintiff bank and had assigned all her rights to the apartment to the plaintiff bank because there was no strata title issued yet. Subsequently, at the conclusion of an inquiry held under s 261 of the National Land Code, the Land Administrator ordered the land to be sold by public auction.

The plaintiff appealed against the decision of the Land Administrator. Relying on s 340(2)(a) of the National Land